

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

No. 77-6130

**IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT**

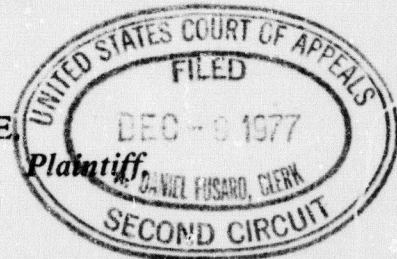
UNITED STATES POSTAL SERVICE,

and

**NATIONAL ASSOCIATION OF LETTER CARRIERS,
*Plaintiff-Intervenor-Appellant,***

v.

**PATRICIA H. BRENNAN, J. PAUL BRENNAN
d/b/a P.H. BRENNAN HAND DELIVERY,
*Defendants-Appellees.***



**On Appeal From An Order of
The United States District Court for
The Western District of New York**

**REPLY BRIEF FOR
THE NATIONAL ASSOCIATION OF LETTER
CARRIERS AS INTERVENOR-APPELLANT**

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UNITED STATES POSTAL SERVICE,

Plaintiff,

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1. In their brief, defendants-appellees make several statements which we believe are inaccurate and mislead the Court as to the nature of the parties and the action in the court below as well as misrepresent the position of the Union. Initially, it should be noted that contrary to the impression created by defendants-appellees (Br., p. 2), the United States Postal Service is not simply a "quasi-public corporation . . . to replace the former United States Post Office." In fact, the Postal Service is "an independent establishment of the executive branch of the Government of the United States," 39 U.S.C. § 201. Furthermore, the suggestion by defendants-appellees (Br., pp. 6, 17-18) that 39 U.S.C. § 1208(c) limits suits by labor organizations representing Postal Service employees to suits for enforcement of collective bargaining agreements is patently specious. Thus, jurisdiction over actions to enforce collective bargaining agreements by and against the Postal Service is established by Section 1208(b) of the Postal Reorganization Act (39 U.S.C. § 1208(b)), which is the analogue of and is essentially parallel to Section 301(a) of the Taft-Hartley Act. 29 U.S.C. § 185. By way of contrast, Section 1208(c) is the general jurisdictional grant which authorizes a labor organization to "sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." 39 U.S.C. § 1208(c). It is the parallel of Taft-Hartley Section 302(b).

This jurisdictional grant clearly is not limited in any way and extends to all actions brought by or against labor organizations.

In attempting to bring the instant case within the ambit of American Postal Workers Union v. IPSA, 349 F.Supp. 1297 (E.D. Mich, 1972), aff'd 481 F.2d 90 (6th Cir., 1973), cert. granted 414 U.S. 1110 (1973), cert. dismissed 415 U.S. 901 (1974), defendants-appellees erroneously suggest that the instant action is brought as an essentially criminal proceeding (Br., pp. 13-15). However, as the record clearly illustrates, the complaint filed on behalf of the Postal Service is a civil action, brought under the civil components of the Private Express Statutes, seeking injunctive and equitable relief to prevent defendants-appellees from continuing the private carriage of letter mail (A. 7). The complaint in intervention filed by the Union contains essentially the same factual and legal allegations as the Postal Service complaint, differing principally from the latter only by way of its request for preliminary injunctive relief (A. 28-31). Surely defendant-appellees' citation to one allegation in the Union's complaint in intervention (A. 30) - - that defendants-appellees' business is also declared unlawful by the provisions of 18 U.S.C. § 1696 (the "criminal" component of the Private Express Statutes, but under which the Postal Service has the authority to codify regulations con-

cerning "letter" mail) -- cannot transform the civil complaints filed by the Postal Service and the Union, both of which seek only civil relief and do not seek any declaration that defendants-appellees are engaged in criminal acts, into a criminal action. The complaint in the instant case is not at all similar to the basic "claim of the plaintiff [APWU] that defendants' actual and anticipated activities violate the criminal sanctions Congress has imposed to delimit and preserve the postal monopoly . . . " APWU v. IPSA, supra, 349 F.Supp at 1298. Therefore, since what are known collectively as the Private Express Statutes are comprised almost entirely of indisputably civil provisions (39 U.S.C. § 601-606) and civil regulations thereunder (39 CFR § 310.1(a); 39 CFR 33211-13) which have been incorporated into the Postal Reorganization Act of 1970 and which form the basis of the instant complaint (A. 7-8), there is no reasonable basis to suggest that the instant action is essentially brought under a criminal statute. Indeed, it is well known, and the District Court for the District of Columbia has recently recognized that the "criminal" component of the Private Express Statutes, 18 U.S.C. § 1696, had its origin as civil revenue statute and was separated from the rest of the civil provisions only when United States criminal provisions were codified into Title 18 in 1909. Associated Third Class Mail Users v. United States Postal Service, No. 76-1768 (D.D.C.) (Memorandum opinion and order, November 29, 1977).

Emphasizing the essentially civil nature of the Private Express Statutes, the District Court for the District of Columbia also acknowledged that the rulemaking authority of the Postal Reorganization Act, 39 U.S.C. § 401(2), also extends to 18 U.S.C. § 1696. Ibid. For other rulings characterizing the Private Express Statutes as civil revenue statutes, see United States v. Bromley, 53 U.S. (12 How.) 87, 95 (1851); 4 Op. Attny. Gen. 159, 161-162 (1843); 21 Op. Attny. Gen. 394, 398 (1896).

Defendants-appellees also err when they attempt to create the impression that at "issue in the case is not whether the existence of private competition would diminish Postal Service revenues and possibly jeopardize postal employee job benefits and opportunities . . ." (Br., p. 5). Thus, in paragraph 20 of its complaint (A. 7), the Postal Service specifically alleges that, "as a result of the business and activities of the defendants, their agents and employees, the U.S.P.S. is deprived of postage revenue to which it is entitled and which, in the aggregate, is vital to the performance of its statutory functions." Significantly, as the record reflects (A. 14), defendants-appellees deny this allegation, and the issue of the impact of unlawful competition on Postal Service revenues and its financial stability, with the concomitant consequences for employees, are obviously at the heart of the case.

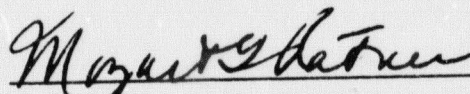
Similarly, defendants-appellees seriously misrepresent the Union's position when they claim the fact to be that "it conceded in the court below that its interests are adequately represented, at least in a general sense, by the existing plaintiff" (Br., p. 28). The Union at all times steadfastly maintained that its interests were not adequately represented by the existing plaintiff. Indeed, the passage in the Union's Brief (p. 24) to which defendants-appellees refer makes clear that it was defendants-appellees who made the curious contention in the court below that the Union's interests are adequately represented by the government, while simultaneously asserting that they would be prejudiced by the Union's intervention since the Union sought preliminary injunctive relief which the government was not willing to seek on its behalf.

2. Defendants-appellees cite (Br., p. 11) Warth v. Seldin, 495 F.2d 1187 (2nd Cir. 1974), aff'd 422 U.S. 490 (1975), apparently for the proposition that standing is a requisite for intervention. Defendants-appellees' reliance on that case is misplaced, however, for as the quoted passage from the opinion of this Court fully illustrates, this Court did not reach the issue therein of denial of permissive intervention under Federal Rule of Civil Procedure 24(b). Indeed, as this Court's opinion reveals, in the context of an action which

was dismissed because all of the plaintiffs-appellees were found to lack standing and where the proposed intervenor also lacked standing to bring such an action, no claims raised either by the respective organizations or their members against the town's zoning laws were actionable, and the complaint was necessarily dismissed. In such circumstances, we submit that it is obvious why the Supreme Court analyzed the lower courts' decisions solely in terms of standing. See 422 U.S. at 514-516.

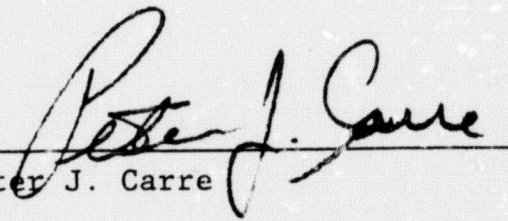
3. Finally, with regard to their contention that the court below properly denied the Union's application for permissive intervention, ~~defendants~~ defendants-appellees claim (Br., p. 32) that "delay and/or prejudice would be certain to arise from at least four different sources if intervention is permitted." In addition to raising two further arguments concerning delay and/or prejudice which were not urged in the court below, Defendants-appellees' contentions ignore the essential fact that the court below did not cite undue delay and/or prejudice in its order denying the Union's application for intervention; and its decision, therefore, cannot be defended on those grounds before this Court. Nuesse v. Camp, 385 F.2d 694, 704 (D.C. Cir., 1974).

Respectfully submitted,



Mozart G. Ratner

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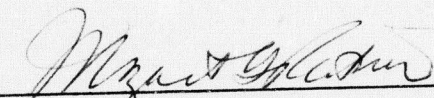

Peter J. Carre

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief for Plaintiff-Intervenor-Appellant were sent by first class mail, postage prepaid, on the 7th day of December, 1977, to:

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